

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

STEVEN FODER, : Civil No.  
 : 14-cv-3935-MCA  
 :  
 Plaintiff, :  
 :  
 v. : TRANSCRIPT OF  
 : TRIAL PROCEEDINGS  
 :  
 PORT AUTHORITY TRANS HUDSON : VOLUME 4  
 CORPORATION, :  
 :  
 Defendant. :

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Newark, New Jersey  
November 17, 2016

**BEFORE :**

THE HON. MADELINE COX ARLEO, U.S.D.J.

Reported by:  
CHARLES P. McGUIRE, C.C.R.  
Official Court Reporter

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

s/CHARLES P. McGUIRE, C.C.R.

CHARLES P. McGUIRE, C.C.R.

**APPEARANCES:**

**BARISH ROSENTHAL**  
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**BY: SAMUEL J. ROSENTHAL, ESQ., and**  
**ANTHONY M. DiGIULIO, ESQ.**  
**Attorneys for Plaintiff**

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**New York, New York 10007**  
**Attorney for Defendant**

1 (Jury out)

2 THE COURT CLERK: All rise.

3 THE COURT: Good morning, everybody. Everybody  
4 rested and ready?

5 MR. ROSENTHAL: We are ready, Your Honor.

6 (Laughter)

7 (Off the record discussion)

8 MR. MINO: Before we bring the jury in, Your  
9 Honor, the next witness is Gus Ubaldi. My binder did not  
10 include his report. I was going to give you a copy for  
11 reference.

12 THE COURT: Yes, sure. Come on up.

13 MR. MINO: Thank you.

14 THE COURT: Any other questions?

15 THE COURT CLERK: Bring them in?

16 MR. ROSENTHAL: No other questions from Plaintiff,  
17 Your Honor.

18 MR. MINO: No questions from Defendant.

19 THE COURT: Was this gentleman's deposition taken?

20 MR. ROSENTHAL: No.

21 THE COURT: So there will be all kinds of  
22 surprises.

23 MR. MINO: It's going to be a fun morning.

24 THE COURT: Yes. All mornings here are fun.

25 (Laughter)

1 MR. ROSENTHAL: Mr. Widas's demonstrative exhibit,  
2 which is Court Exhibit 3, is in the jury room.

3 THE COURT: In the jury room?

4 MR. ROSENTHAL: No, no --

5 THE COURT: Okay. Thank you.

6 THE COURT CLERK: All rise.

7 (The jury enters)

8 THE COURT: Good morning, everyone. Welcome back.

9 Do you have an extra copy of this report that was  
10 handed to me?

11 MR. MINO: Sure.

12 THE COURT: Give one to Alex, if you don't mind.  
13 Thank you.

14 MR. MINO: Anyone else?

15 THE COURT: No, we're good.

16 All right. Want to proceed?

17 MR. MINO: Sure.

18 At this time, Defendant calls Augustus Ubaldi.

19 THE COURT CLERK: You can just go right up.

20 Sir, if you can raise your right hand, place your  
21 left hand on the bible, please.

22 A U G U S T I N E U B A L D I, called as a witness on  
23 behalf of the Defendant, and having been duly sworn,  
24 testified as follows:

25 THE COURT CLERK: Please state your full name for

1 the record and spell it, please.

2 THE WITNESS: Full name is Augustine,  
3 A-u-g-u-s-t-i-n-e, middle initial F, last name is Ubaldi,  
4 U-b-, as in boy, -a-l-d-, as in David, -i.

5 DIRECT EXAMINATION

6 BY MR. MINO:

7 Q. Good morning, Mr. Ubaldi. How are you?

8 A. Outstanding.

9 Q. All right. Are you currently employed?

10 A. Yes, sir.

11 Q. What's your current job?

12 A. I am an independent consultant with Robson Forensic,  
13 and they are a firm that does expert witness work.

14 Q. Okay. And what type of matters do you consult on?

15 A. I consult in matters regarding railroads and airports.

16 Q. Okay. And can you give the jury the benefit of your  
17 educational background?

18 A. Certainly.

19 I have a Bachelor of Science degree in civil  
20 engineering from Syracuse University.

21 Q. Okay. And have you ever worked for a railroad?

22 A. Yes. I started my career 46 years ago with the Penn  
23 Central Railroad. After leaving there, I spent time in  
24 Washington, D. C., for a private engineering company  
25 designing the Washington, D. C. subway, and then I went to

1 work for the Greater Cleveland Regional Transit Authority,  
2 the transit authority in Cleveland, Ohio.

3 I also volunteer with the Cuyahoga Valley Scenic  
4 Railroad, which runs through the middle of the Cuyahoga  
5 Valley National Park, also in Cleveland, and I am a  
6 trainman, a brakeman, and a track inspector for them.

7 Q. Okay. And are you a certified engineer?

8 A. No, I am not a certified engineer. I'm a certified  
9 brakeman.

10 Q. Okay. But as far as a civil engineer.

11 A. Oh, I am sorry. Yes, I am a licensed professional  
12 engineer in nine states and the District of Columbia.

13 I am also a member of the American Railway  
14 Engineering and Maintenance of Way Association, the American  
15 Society of Civil Engineers. I am an authorized volunteer  
16 for Operation Lifesaver, which is a national nonprofit  
17 organization that works to reduce accidents, injuries, and  
18 fatalities on and about grade crossings and on railroad  
19 tracks.

20 I am adjunct faculty at Cuyahoga Community  
21 College, and I teach -- which is also in Cleveland, teaching  
22 in the construction engineering technology program.

23 And in my volunteer duties with Cuyahoga Valley  
24 Scenic Railroad, I also advise the Park Service, who owns  
25 the tracks, on track rehabilitation, and conduct annual

1 recurrent training in Code of Federal Regulations Part 214,  
2 which is about roadway worker on-track safety.

3 Q. Okay. And does any of your work include testifying in  
4 legal matters?

5 A. Yes, it does.

6 Q. Okay. How much?

7 A. All the work -- all the work that I do for Robson.

8 Q. And you testify for Plaintiffs, or Defendants, a mix?

9 A. It's a mix. It's about 60-40 Plaintiff-Defendant.

10 Q. Okay, and can you just talk a little bit more about  
11 the work that you do for Robson?

12 A. Well, I will do work concerning grade crossings. If  
13 there's an accident at a grade crossing, someone gets hit,  
14 did the grade crossing have the proper protection; did the  
15 motorist follow all the proper procedures?

16 I have done various employee injury cases that  
17 have to do with either operating or track issues.

18 I have done a number of airport cases. One  
19 involved an international airport where there was a question  
20 of whether the runway had been properly designed.

21 It can be pretty eclectic.

22 Q. And in your work, either on the railroad or with  
23 Robson, have you become familiar with the Federal Railroad  
24 Administration?

25 A. Yes, I have.

1 Q. And just explain to the jury what that is.

2 A. The Federal Railroad Administration is a Federal  
3 agency that is charged with overseeing railroads that make  
4 sure they provide -- that they follow the regulations. For  
5 example, there is another Federal regulation, number -- Part  
6 213, which has to do with track safety standards, and I  
7 follow that when I do my track inspections, and  
8 periodically, an FRA track safety inspector will ride with  
9 me just to see that our railroad is doing the proper things  
10 in keeping the track safe.

11 Q. And are you being paid for your time today?

12 A. Yes, I am.

13 Q. How much?

14 A. I forget what the actual billing rate is. It's about  
15 \$400 an hour.

16 Q. And did there come a time when you were retained by  
17 PATH to write a report?

18 A. Yes.

19 Q. Okay. And in that report, did you review any  
20 materials in writing that report?

21 A. Yes, I did.

22 Q. And what did you review?

23 A. I reviewed the Employee Occupational Injury Report,  
24 the Unusual Occurrence Report, the Plaintiff's Summons and  
25 Complaint, PATH's Answer, Plaintiff's initial disclosures,



1       PATH's initial disclosures, Plaintiff's response to document  
2       demands, Plaintiff's response to interrogatories, PATH's  
3       response to discovery demands, PATH's responses to  
4       interrogatories, depositions of Steven Foder, Sandra Bou,  
5       Dennis Velez, Gregory Reich, Astagne Avril, Kenneth Wallace,  
6       I looked over the report of George Widas and photographs  
7       taken by George Widas, and I also conducted a site  
8       inspection on February 16th of this year.

9       Q.     Have you previously been called to testify as an  
10      expert in state and Federal Courts?

11      A.     Yes, I have.

12      Q.     Okay.

13               MR. MINO: Your Honor, at this time, I would like  
14      to offer Augustine Ubaldi as an expert.

15               THE COURT: Any objection?

16               MR. ROSENTHAL: Can I ask some questions?

17               THE COURT: Sure.

18               MR. ROSENTHAL: Thank you, Your Honor.

19                               VOIR DIRE

20      BY MR. ROSENTHAL:

21      Q.     Mr. Ubaldi, have you and I ever met before?

22      A.     No.

23      Q.     Good, because I don't remember meeting you, either.

24               (Laughter)

25      Q.     Your CV lists your areas of expertise. Track

1 structure design?

2 A. Yes.

3 Q. Is this a case about track structure design?

4 A. No, it is not.

5 Q. Station repair, yard track improvement, bridge repair?

6 A. No.

7 Q. Now, you are familiar with the FRA rules on Subpart

8 213?

9 A. Yes.

10 Q. Track Inspection and Supervision?

11 A. Yes.

12 Q. Is this case involving that?

13 A. No.

14 Q. You mentioned 214, Roadway Worker.

15 A. Yes.

16 Q. Does this case involve that?

17 A. No.

18 Q. You're qualified in rail radio procedures?

19 A. Yes.

20 Q. Is this case about that?

21 A. No.

22 Q. You have a lot of background in rail-highway grade  
23 crossing safety and design. Is this case about that?

24 A. No.

25 Q. Railway signaling concepts; is this case about that?

1       A.       No.

2       Q.       Time, distance and speed investigations involving rail  
3       operations; is this case about that?

4       A.       No.

5       Q.       Derailment inspection; is this case about that?

6       A.       No.

7       Q.       And half of your work has been in the airport area?

8       A.       I don't know if -- I don't have a number of what half  
9       my work is. Those are the two areas of expertise that I  
10      have.

11      Q.      Okay. But this case is just on the railroad side?

12      A.      Correct.

13      Q.      Now, you're knowledgeable about the rules that guide  
14      conductors in how to work? You're a certified conductor?

15      A.      I'm not a certified conductor. I'm a certified  
16      brakeman.

17      Q.      Okay, you're a certified brakeman, not a certified  
18      conductor; correct?

19      A.      Correct.

20      Q.      Not a certified engineer.

21      A.      No.

22      Q.      And you're certified as a brakeman for the Scenic  
23      Railroad in Cuyahoga Valley?

24      A.      That is correct.

25      Q.      You're a volunteer for them?

1       A.       That is correct.

2       Q.       And are you qualified to maintain or inspect railroad  
3       equipment?

4       A.       No.

5       Q.       Are you qualified to operate railroad equipment?

6       A.       Yes.

7       Q.       To operate from the perspective of a brakeman?

8       A.       Yes.

9       Q.       Can you operate a train as an engineer would?

10      A.       No.

11      Q.       So you're here to testify in your capacity as a  
12      qualified brakeman?

13      A.       Yes, and knowledgeable of railroad operating rules.

14      Q.       Okay. But you're not here to testify about the  
15      inspection and maintenance and all that. You have no -- do  
16      you have expertise in that?

17      A.       I have expertise in what the rules say. I have  
18      expertise in operating around -- around equipment and  
19      following the rules. For example, as a brakeman or a  
20      trainman, I'm climbing locomotives, I'm climbing rail cars.  
21      As a track inspector, I'm climbing a specially equipped  
22      pickup truck that rides on the track.

23      Q.       But in term of inspection and maintenance of rail  
24      cars, that is not your area of expertise; correct?

25      A.       I do not do inspection of rail cars.

1                   MR. ROSENTHAL: We have no objection to the  
2                   witness.

3                   THE COURT: You've asked to have him qualified as  
4                   a witness in what area?

5                   MR. MINO: He was qualified as a railroad expert.

6                   THE COURT: What does that mean? I mean, that  
7                   could be from engines to -- I'm looking at his report, and I  
8                   don't see any -- I'm looking at his expert report. I'm not  
9                   sure what you're trying to qualify him as. It needs to be  
10                  narrow. It can't just be as a railroad expert.

11                  MR. ROSENTHAL: I would ask that he be confined to  
12                  the areas where he testified he has expertise.

13                  THE COURT: I don't know what that means. He said  
14                  something here, and then what he's talking about in his  
15                  report is a little bit broader.

16                  Why don't we talk at sidebar for a minute?

17                  MR. MINO: Sure.

18                  (The following takes place at sidebar)

19                  THE COURT: Okay. So what I'm concerned about is,  
20                  I looked at his conclusions, and he talks about, you know,  
21                  PATH inspected the car, PATH required safety regulations. I  
22                  don't think -- there are cases about they didn't comply with  
23                  safety regulations in terms of the Federal regulations that  
24                  the lay witnesses said. But as I understand your cases,  
25                  that those are the minimum, but to make it safe, they had to

1 have these other safety features, like the grip tape, which  
2 was to prevent a fall, and the bar needed to be right on top  
3 of it. That's the whole case.

4 So I don't see what his expertise -- is he opining  
5 on that?

6 MR. MINO: Yes, because there are no regulations  
7 that require placement of grip tape, which he will say.  
8 He's familiar with the safety regulations --

9 THE COURT: Right.

10 MR. MINO: -- the safety regulations that  
11 Mr. Widas says requires the bar to be directly above it. He  
12 will testify it does not.

13 THE COURT: Okay. So then he can testify to that,  
14 but can he testify that you don't need to have the grip tape  
15 and you don't need to have the bar at symmetrical? Because  
16 that is -- it's almost as if he's been qualified as a legal  
17 expert on regulations, and I'm not sure that that's a proper  
18 scope of testimony that he can testify that -- I guess  
19 broadly speaking we could have him testify that they  
20 properly complied with the Federal OSHA regulations. That's  
21 not in dispute here. They never challenged that PATH  
22 complied with the Federal regulations.

23 MR. ROSENTHAL: The FRA regulations.

24 THE COURT: FRA. No one's disputing that. It's  
25 not an issue in this case. What's at issue in this case is

1       whether they should have done more than the minimum per the  
2       FRA. That's the whole case.

3               So their expert said the amalgamation of all of  
4       these other regulations requires and in my expert opinion  
5       requires a safety grip tape and the bar being symmetrical.  
6       He never said that they were not in compliance with binding  
7       regulations.

8               MR. MINO: No, what he testified to was, I looked  
9       at the FRA and I understand -- I'm not saying that they  
10      didn't comply with binding regulations, but based on this,  
11      they should have done that. Based on this regulation, which  
12      I get doesn't 100-percent apply, but I'm still going to say  
13      that they should have done what this regulation says.

14              THE COURT: Yes. So is that all he's going to  
15      testify to? Because I don't see him as an expert to respond  
16      to Widas's opinion that grip tape would have made it safer.  
17      That's it. Is what you had safe? Widas never disputed -- I  
18      mean, no witness in this case has ever disputed, you  
19      absolutely didn't need the grip tape, it would have caused  
20      more problems. The witnesses sort of danced around the  
21      issue: We think our train is safe, and we complied with  
22      regulations, and therefore, it was safe. Okay? If he's  
23      going to say, we complied with regulations and it was safe,  
24      I'll let him do that; but the real issue is, is he going to  
25      talk about the grip tape and the bar, independent of

1 regulations?

2 MR. MINO: What he will -- you mean to say that  
3 the area -- the bare metal edge area didn't need the grip  
4 tape. That's what he will say, yes.

5 THE COURT: Because?

6 MR. MINO: Because it wasn't required anywhere.

7 MR. ROSENTHAL: That's what the judge is saying.

8 THE COURT: That's my point. What's his  
9 expertise, then? So -- because his --

10 MR. ROSENTHAL: That's not disputed.

11 THE COURT: It's not disputed. His expert didn't  
12 say it's absolutely required.

13 MR. MINO: No, he did say it was required.

14 THE COURT: No, he didn't. He didn't. He said  
15 other regulations in other contexts require it. This is not  
16 negligence per se. This isn't that they had a regulation  
17 and they didn't comply with it. He said, well, if I look at  
18 other contexts that don't apply here, they require grip  
19 tape, and I think in my expertise as a safety engineer that  
20 grip tape would have been -- the car was not safe without  
21 grip tape. That's really what he said.

22 So this guy is just going to talk about  
23 regulations. There's a fine line when you're talking about  
24 regulations and him opining on, you didn't need the grip  
25 tape, because I don't think it's a safety -- someone



1       qualified in safety engineering to say, you really didn't  
2       need grip tape; as long as you put your foot straight down  
3       on the surface, it's perfectly fine, it's reasonable, it's  
4       compliant with law. But does he even have the expertise --  
5       which I haven't heard -- to even opine on what makes  
6       something safe as opposed to what the railroad regulations  
7       require? It sounds like he's an expert on railroad  
8       regulations, not safety.

9               MR. MINO: I would say he's a expert on railroad  
10       safety. He knows what the regulations require.

11              THE COURT: Railroad safety regulations, then, not  
12       railroad safety. There's nothing in this report that  
13       suggests he's an expert in safety at all. He doesn't do any  
14       safety stuff with railroads. He knows the safety  
15       regulations. That's it. There's a difference between  
16       saying, I know what safety regulations are, I know what they  
17       have to do to comply with regulations, as opposed to, I can  
18       look at how they operate independent of the regulations and  
19       opine on what's reasonably safe. And I don't think he can  
20       express an opinion on the latter.

21              Unless you want to establish that he has an  
22       independent basis in safety. It doesn't sound like he has  
23       any background in safety at all. That's why I said, what  
24       are you qualifying him for?

25              I mean, this is what he talks about.

1 Do you have his CV?

2 MR. ROSENTHAL: I don't have it here.

3 Do you have his CV?

4 MR. MINO: I have it somewhere.

5 THE COURT: Yes, here, he says, about the grip  
6 tape, it's on page six. He says: "When Foder stated 'there  
7 was nothing technically wrong with the train, per se,' he  
8 added that 'grip tape should have been on the train.'"

9 I mean, it's not Foder's opinion that's actually  
10 an expert opinion. What he thinks is not particularly  
11 compelling.

12 "No evidence has been presented of any  
13 governmental or other 'safety regulation and/or guidance  
14 concerning the maintenance'" and repair of the...

15 So that's all he's going to talk about is,  
16 whatever -- no matter what they say, the regulations  
17 didn't --

18 MR. ROSENTHAL: Require it.

19 THE COURT: -- didn't require it.

20 MR. ROSENTHAL: And that's not disputed.

21 THE COURT: And he talks about his -- he  
22 challenges why this is analysis of friction.

23 MR. MINO: He also talks about the claim that they  
24 failed to maintain the car properly, failed to inspect it  
25 properly.

1 THE COURT: That's fine.

2 MR. ROSENTHAL: But he doesn't have any expertise  
3 in inspection or maintenance of rail cars. He just said  
4 that.

5 THE COURT: He did. He says, I'm not an expert.

6 You may want to examine him a little more. That's  
7 why I asked did you have a deposition taken. You're right,  
8 he just said, I know about railroad regulations, I'm not an  
9 expert in safety or maintenance of cars.

10 And I guess he can talk about the fact that he  
11 didn't actually run friction analysis with a deficit, but he  
12 doesn't conclude --

13 MR. MINO: And then he also talks about how he  
14 climbed up and down the car and his --

15 THE COURT: So? I could climb up and down the  
16 car. That doesn't make me an expert.

17 MR. MINO: But he can testify that he's done it  
18 for years and what the normal working conditions are.

19 THE COURT: You know what? And see, Foder's done  
20 it for years. I wouldn't qualify him as an expert. So did  
21 Ms. Bou. She's been climbing for years. I wouldn't qualify  
22 her as an expert in safety. She's a worker. That's the  
23 difference.

24 So I'm saying you haven't established with this  
25 witness any expertise beyond he knows the safety regulations

1       about railroads.

2               What would make him helpful to the jury about  
3 climbing; the fact that he climbs up and down trains? I  
4 climb up stairs every day; I've been doing it for 52 years.  
5 It doesn't make me an expert in stairs. What do I tell the  
6 jury about stairs? Nothing.

7               So he has to say something more than, I climb on  
8 trains because I'm a volunteer conductor for some railroad.  
9 He has to say, I have expertise, I know about safety on --  
10 establish, if you can, that he's an expert in safety  
11 features on cars.

12              The fact that you climb up a car doesn't make you  
13 an expert in how to make the cars reasonably safe. That's  
14 what the whole case is about.

15              So that's where I'm missing. I mean, where is his  
16 expertise to say he inspected -- maybe he can inspect the  
17 car to say it's compliant with the guidelines, the FRA  
18 guidelines. That's probably within his expertise, because  
19 he knows the guidelines and he can inspect them. But I  
20 don't know if he can testify beyond that because I don't see  
21 it. You haven't established it yet.

22              What can he say beyond, I inspected the car, it  
23 complies with guidelines; these are the guidelines, I know  
24 them well; I worked as an engineer and a conductor.

25              I mean, I don't even know how his civil

1       engineering background makes him an expert on FRA  
2       Guidelines. It sounds like he just knows it because he's a  
3       conductor, or a brakeman.

4               He's a brakeman, right? He's not a conductor.

5               MR. ROSENTHAL: He testified that he's just a  
6       brakeman.

7               THE COURT: In other words, if I'm a civil  
8       engineer -- he can talk about friction, I get that, and  
9       somehow the friction analysis made Widas's testimony  
10      incompetent. You could tie that up, about the friction.

11              But civil engineers don't learn about Federal  
12      railroad regulations. He learned about that in I guess his  
13      job.

14              But what makes him an expert in safety?

15              MR. MINO: Because I think the distinction between  
16      safety and FRA regulations is much less -- it's not clearly  
17      as defined as everyone is trying to make it out to be. If  
18      you comply with -- the argument is, the compliance with the  
19      FRA is the safety.

20              THE COURT: Well, but see, there's two different  
21      ways of looking at it. This is critical. You can say, I  
22      look at this train and I know the regulations, and I can say  
23      that this car complies with all the regulations.

24              And by the way, that's not in dispute in the case.  
25      Widas never said it wasn't in compliance. If it was not in

1 compliance, it would be negligence per se. He can say that.  
2 That's helpful to say it's FRA-compliant. But then he has  
3 to take it to the next step to say, independent of the  
4 regulation, I don't -- just because they comply, I am of the  
5 opinion that it was not safe, or it is safe, --

6 MR. ROSENTHAL: And he never says that --

7 THE COURT: -- because I'm an expert in safety. I  
8 know all -- I've done safety analysis, I know about human  
9 error analysis, all those areas of study in my practice, and  
10 I can tell you, arguably, that you don't need the grip tape,  
11 because as long as you put your foot on, it's safe enough.

12 I don't think he can say that because he has no  
13 expertise in that area to offer an opinion independent of  
14 the regulation.

15 MR. ROSENTHAL: And never does. He doesn't offer  
16 that.

17 THE COURT: And even in his report, he doesn't say  
18 anything that gives him the right to say that. He might  
19 want to say it. I'm not going to let him unless you  
20 establish he has an independent basis to opine on safety.

21 His only basis that you qualified him for under is  
22 with regard to the regulation. Well, you know what? So  
23 were all the PATH people that he brought out. They were all  
24 experts in regulation. They're trained in it. Avril did  
25 it, and the other two guys said, we complied with FRA

1 regulations. What he's saying is duplicative of that.

2 But I want you to know that unless you show me,  
3 I'm not allowing you to go beyond that to say, my safety  
4 experience says this train didn't need the grip tape, the  
5 bar was fine. I don't think it's in the report anyway.

6 I just want to make sure we're all on line. I'm  
7 going to qualify him as an expert in railroad safety  
8 regulations and in civil engineering. But I'm not going to  
9 qualify him for safety.

10 MR. ROSENTHAL: And there's one other issue, Your  
11 Honor, that I want to bring to your attention now. I was  
12 going to bring it out later, when I started cross.

13 One of his opinions is, This train is safe because  
14 I was able to climb it. He climbed this train, and he's  
15 also criticizing Widas for not doing certain --

16 THE COURT: Velocity testing.

17 MR. ROSENTHAL: -- testing on --

18 THE COURT: The numbers.

19 MR. ROSENTHAL: -- on that area. The area is  
20 covered with grip tape. If he makes those -- those  
21 opinions, I can -- that opens the door, and I can ask him  
22 about, well, wasn't the area covered by grip tape, and  
23 therefore, he was unable to --

24 THE COURT: Well, let's see if he opens it.

25 MR. MINO: Also, the way he climbed up --

1                   MR. ROSENTHAL: But he's making criticisms of  
2                   Widas not doing experimentation.

3                   THE COURT: But if he says, I climbed up, and I'm  
4                   confident that this train complied with the FRA, that's  
5                   fine.

6                   MR. MINO: Right, and also, when he climbed up,  
7                   and it's in his report, he put his foot on the diamond  
8                   plate.

9                   You can't say, you climbed up and you put your  
10                  foot on the grip tape.

11                  MR. ROSENTHAL: I can't tell that by the report.

12                  THE COURT: So he climbed up. What is he going to  
13                  say; it complied with the FRA?

14                  MR. MINO: It complied with the FRA, and it was no  
15                  different than any other train I climbed up.

16                  THE COURT: That's fine, he can say that; but he's  
17                  not going to go to the next level and say this is reasonably  
18                  safe.

19                  MR. MINO: No.

20                  MR. ROSENTHAL: But if it's no different from any  
21                  other train --

22                  THE COURT: No, that doesn't open the door. It  
23                  doesn't. If he says -- because the jury doesn't know about  
24                  subsequent remedial measures. They just don't know.

25                  MR. ROSENTHAL: I know, but it does impact --



1 THE COURT: No, he has a point. If he says, I  
2 climbed up, it's no different than the other train and it's  
3 safe, is it safe because that grip tape was on there?

4 MR. MINO: I will lay the foundation that he  
5 places his entire foot on the diamond plate.

6 THE COURT: But did the train that he climbed up  
7 have grip tape on it?

8 MR. MINO: Yes, it didn't come into play at all --

9 THE COURT: Oh, wait. He climbed up on a train  
10 with grip tape?

11 MR. ROSENTHAL: Yes.

12 THE COURT: Then if you're going to say he climbed  
13 up on that train and it's safe as is, and then he says,  
14 well, let me ask you something, the train you climbed up has  
15 grip tape, then he's opining on the very design that they're  
16 expressing --

17 MR. MINO: But he will be saying that it's safe  
18 because you put your entire foot on the diamond plate.

19 MR. ROSENTHAL: Based solely on his -- here, based  
20 solely on his ability to climb up on that train. That  
21 train.

22 THE COURT: He's right. He said, I was able to  
23 climb it safely. He should be allowed to cross-examine him  
24 on: What did you climb on?

25 Well, there was grip tape on it.

1           Because the jury could easily say, well, he was on  
2           the diamond, but you know, there was grip tape. Why is  
3           there grip tape?

4           In other words, you can't have it both ways. If  
5           you're going to open that door and -- if the train that he  
6           climbed on had the safety feature that they say was lacking  
7           for Mr. Foder, he can't climb up there and say this train  
8           was safe and it would have been safer than a different train  
9           without grip tape. The train he climbed on had grip tape.  
10          That's maybe the reason why he didn't fall. They have the  
11          right to cross-examine him on it.

12                 MR. MINO: Not if he says, I put my foot entirely  
13           on the diamond plate and -- it doesn't come into play at  
14           all.

15                 THE COURT: It does come into play, because --

16                 MR. MINO: Not if you don't use it.

17                 THE COURT: This is -- I'm telling you, you're  
18           opening the door. I'm giving you full and fair warning: If  
19           he talks about climbing onto a train with grip tape, you can  
20           say, well, I put it on the diamond, and it's fair  
21           cross-examination for them to say, yes, but didn't you have  
22           the security knowing there was grip tape on the end, and  
23           this is different than the car that Mr. Foder went on.  
24           That's fair cross-examination. It would be reversible error  
25           not to allow them to test that. He didn't test, and he

1       climbed on a car that has the very same safety feature that  
2       the whole case is about. Doesn't matter if you --

3               MR. MINO: Can I put it on the record?

4               THE COURT: Sure you can.

5               MR. MINO: So the Petrie case, which I believe  
6       Your Honor said is guiding this, talks about coming in for  
7       impeachment when it claims it was the best or safest, or  
8       words to that effect.

9               That is not what he is going to testify to.

10              THE COURT: There is a difference. This is not  
11       impeachment. He is going to testify that, I was able -- I'm  
12       a 70-year-old guy, I'm an engineer, I climbed trains my  
13       whole life, I was safely able to climb this train.

14              And how were you able to climb the train?

15              I put my foot on the diamond plate.

16              It is fair game for them to say, wasn't there grip  
17       tape on the smooth surface, unlike Mr. Foder, right?

18              So, yes, there was.

19              And why was that?

20              Well, the train I climbed had it on.

21              Now, if that's all he says, they haven't opened  
22       the door to the subsequent remedial measures. It doesn't  
23       mean -- he doesn't get to say, wasn't there a change in all  
24       the cars. I won't allow that. But the jury's going to know  
25       the train -- for whatever reason, the train he climbed up

1 had grip tape. I'm not going to let them open it to --

2 MR. ROSENTHAL: The whole thing.

3 THE COURT: -- the renovation, but the jury is  
4 entitled to know, if he's going to say on this witness  
5 stand, I climbed safely on that train, and I inspected it  
6 and all was fine, and I put my foot on the diamond plate,  
7 for them to say that, Didn't the train you climbed, didn't  
8 that particular train that you climbed that was different  
9 than Mr. Foder's have grip tape? That's what I'm going to  
10 allow.

11 MR. MINO: I guess -- you just said, though,  
12 that's not impeachment. The only way a subsequent remedial  
13 repair comes in for is impeachment.

14 MR. ROSENTHAL: No, that's not true.

15 MR. DiGIULIO: No, no, no.

16 THE COURT: Here's why. It's not being offered to  
17 show a subsequent remedial repair. It's being offered to  
18 show the status of the train when he climbed on it.

19 MR. MINO: It's being offered to show --

20 THE COURT: Don't argue with me. This is not even  
21 close. You cannot have an expert who's going to say, I  
22 climbed on a train and it was perfectly fine and it's safe,  
23 when the train that he climbed had the same exact safety  
24 feature that this case is all about, and for me to deny them  
25 the opportunity to at least ask the expert, isn't it true

1       that when you climbed up, there was safety tape on the end,  
2       and that was different than the car than Mr. Foder, and ask  
3       him about safety tape.

4               Now, I'm not going to let them open the door about  
5       the whole remediation, but he's allowed to say that the  
6       experiment you did was on a different train than Foder was  
7       on.

8               It's not even close.

9               So you can choose how you want to do the direct.  
10       Maybe you don't want to go there, because the report doesn't  
11       go into evidence, his testimony goes into evidence. But  
12       just be forewarned: If you ask him about that, and you open  
13       the door about him climbing on the train, I'm going to give  
14       them some room to talk about what he climbed on.

15              MR. MINO: Okay. Then I just want to understand  
16       what I can or can't ask in order not to open the door,  
17       because his entire inspection was on a train that had the  
18       grip tape on it. Does that mean I can't ask about any of  
19       the inspection?

20              THE COURT: If you're going to ask him -- if  
21       you're going to talk about his climbing on the train or his  
22       inspection of the train, he's going to be, you know -- if  
23       he's going to talk about the climbing on the train, you're  
24       absolutely going to open the door to, wasn't there grip  
25       tape. If he's just going to say, I observed that -- you

1       give me an example. I don't know what you want to ask him  
2       or how you're going to ask it, so it's hard for me to give  
3       you --

4               MR. MINO: The ultimate question is something  
5       along the lines, when you looked at the train, was there  
6       anything about the train that didn't comply with  
7       regulations? No.

8               THE COURT: Well, that's fine. That doesn't open  
9       the door. Your inspection, did it comply with all the  
10      regulations? Yes, it did. That doesn't open the door.

11              MR. MINO: Because I just want to be --

12              MR. ROSENTHAL: No, that doesn't open the door.  
13      There's no -- there's no objection --

14              THE COURT: Value to it.

15              MR. ROSENTHAL: There's no value to it.

16              THE COURT: It's cumulative. I'll allow it  
17      anyway, but it's cumulative.

18              Okay? Let's go back.

19              (The following takes place in open court)

20              THE COURT: Okay. I know there's an application  
21      to qualify Mr. Ubaldi as an expert, and we're going to limit  
22      that to expertise in railroad safety regulations. Okay?

23              Anything further you want him qualified as?

24              MR. MINO: Not at this time.

25              THE COURT: Okay.

1 DIRECT EXAMINATION (CONTINUED)

2 BY MR. MINO:

3 Q. Okay. Mr. Ubaldi, did there come a time when you did  
4 a site inspection of a PATH car?

5 A. Yes, I did.

6 Q. Okay. Where did that site inspection take place?

7 A. At -- I think it was the Newark shop.

8 Q. Okay. So was it in a building, outside?

9 A. It was in a building.

10 Q. Now, when you look at the PATH train car, did you look  
11 at the available grab bars?

12 A. Yes, I did.

13 Q. And are you familiar with any regulations within the  
14 FRA that speak to placement of grab bars?

15 A. Yes. Again, going back to the Code of Federal  
16 Regulations, Title 49 has to do with transportation, and  
17 Part 231 has to do with railroad safety appliances.

18 Q. Okay. Are you specifically familiar with Part 231.14?

19 A. Yes, I am.

20 Q. Okay. And explain to the jury what that regulation  
21 discusses.

22 A. That particular regulation talks about the safety  
23 appliances, the handholds, the steps for passenger cars with  
24 I believe it's no end vestibule.

25 Q. Okay. And does that include a requirement that the

1 handholds be above the step?

2 A. That is correct.

3 Q. Now, when the requirement says it has to be above the  
4 step, explain what that means.

5 A. Well, it simply means it has to be higher than.  
6 There's no other specificity given in the regulation as to  
7 where above the step it has to be.

8 Q. So on the PATH car that you looked at, was the  
9 handhold above the step?

10 A. Yes, it was.

11 Q. Was it directly above the step?

12 A. No, it was not.

13 Q. So it not being directly above the step, does that  
14 violate that particular section of the FRA?

15 A. No, it would not.

16 Q. Now, did you look at the end step or loop step on the  
17 train?

18 A. Yes, I did.

19 Q. Do you recall about how high above the ground it was?

20 A. I may actually have that here.

21 I thought I had it in here.

22 I can't find it right now, but I believe it's  
23 about -- maybe here, I might have it.

24 I'm quoting from Mr. Widas's report, and it says  
25 the rung was 21 and one quarter inches above top of rail.



1 Q. Okay.

2 A. I knew I had it somewhere.

3 Q. Now, I'm going to show you what's been marked as  
4 Plaintiff's Exhibit 23A.

5 Can you see that?

6 A. Yes.

7 Q. Based on this photo, can you tell where the grab bar  
8 is?

9 A. Yes.

10 Q. Okay. Can you tell where the end step is?

11 A. Yes.

12 Q. Okay. Would it be possible to move the end step in  
13 underneath the grab bar?

14 A. From my inspection, it would be difficult. There's a  
15 -- if you've ever actually operated a model railroad and you  
16 go around a real sharp curve, there's the -- the two cars  
17 will bend like this, and the coupler that holds the two  
18 together will have to swing from one side to the other.

19 Because of the nature of the PATH system, there  
20 are some sharp curves, and so that coupler will swing fairly  
21 wide, and if you move that step any further in, it would be  
22 in the way of the coupler.

23 MR. ROSENTHAL: Objection, Your Honor, to the  
24 scope of his expertise. He's into design issues now.

25 THE COURT: I'll allow it. I don't think we're

1 going much further with that. I'll allow it. He does have  
2 an expertise in railroads as a brakeman.

3 Go ahead.

4 MR. MINO: Okay.

5 Q. Now, in addition to -- when you looked at the PATH  
6 train car that day, was there diamond plate on the PATH  
7 train car?

8 A. Yes, there was, on the anti-climber.

9 Q. Okay. And you testified before that you're familiar  
10 with OSHA.

11 A. Yes.

12 Q. Would you just explain to the jury what OSHA is?

13 A. OSHA is the Occupational Safety and Health  
14 Administration, another Federal agency, and it usually deals  
15 with safety in industrial settings. In most settings on the  
16 railroad, the FRA regulations will govern.

17 Q. Okay. Did OSHA mention anything about diamond plate?

18 A. Yes. In some sections of OSHA, it talks about use of  
19 a non-slip surface, and one of the recommendations it has as  
20 a non-slip surface is diamond plate.

21 Q. So based on your inspection of the PATH train car that  
22 day, is it your opinion -- did you come to an opinion as to  
23 whether or not anything with respect to what you looked at  
24 on that PATH train car violated the applicable safety  
25 regulations?

1 A. I saw no violations.

2 Q. And did you come to this opinion with a reasonable  
3 degree of certainty?

4 A. Yes, I did.

5 Q. And that is, a reasonable degree of certainty as a  
6 railroad safety regulation --

7 A. Yes.

8 Q. -- expert?

9 MR. MINO: I have nothing else.

10 MR. ROSENTHAL: This should hopefully be very  
11 short. Famous last words, right?

12 CROSS-EXAMINATION

13 BY MR. ROSENTHAL:

14 Q. You testified about C.F.R. -- 49 C.F.R. 231.14?

15 A. Yes.

16 Q. Okay, and is it your testimony that this car is in  
17 compliance with that regulation?

18 A. Actually, that car, from documents I've seen from  
19 PATH, there really is no C.F.R. reference that covers an end  
20 step, but if you were to apply -- if you were to use the  
21 guidelines or the information in 231.14, there is nothing in  
22 that arrangement that would violate that section.

23 Q. Okay. So the 231.14 says nothing about the end step.

24 A. Correct.

25 Q. And it says something about handholds; right?

1       A.       It says handholds in terms of sill steps, which are on  
2       the side. There is nothing that talks about end steps in  
3       231.

4       Q.       Right. But it also talks about -- isn't there some  
5       talk in 231 about handholds for coupling?

6       A.       I don't believe so.

7       Q.       231.14(d). Are you familiar with 231.14(d), "End  
8       Handholds"?

9       A.       I'd have to see it.

10      Q.       Okay. But as we sit here now, you're not familiar  
11      with it?

12      A.       I can't recall it offhand.

13      Q.       Well, let me ask you this before we go into a whole  
14      thing. Are you here in any way to give an opinion as to  
15      whether or not PATH is in compliance with 231.14(d)  
16      regarding end handholds?

17      A.       That was not really brought up.

18      Q.       Okay. Then I don't need to go any further into it.

19               MR. ROSENTHAL: Thank you.

20               THE COURT: You're welcome.

21                       REDIRECT EXAMINATION

22      BY MR. MINO:

23      Q.       Are you familiar with what manual coupling is?

24      A.       Yes.

25      Q.       Okay. What is that?

1       A.       Manual coupling is when the two couplers -- they're  
2       called knuckle couplers because they look like a knuckle,  
3       and they come together and form a bond this way. They are  
4       simply mechanical. There is no electronics. It is just  
5       bare metal. And that's what manual coupling is.

6       Q.       Okay. Are you aware of whether or not PATH does  
7       manual coupling or if it has automatic coupling?

8       A.       I believe they have automatic coupling because their  
9       couplers have all the signal lines, the air hose lines, the  
10      train lines that help operate it, and it's all one automatic  
11      thing.

12               MR. MINO: I have nothing else.

13               THE COURT: Okay. You're excused.

14               Thank you.

15               THE WITNESS: Thank you.

16               (Witness excused)

17               THE COURT: All right. So, ladies and gentlemen,  
18      it's 10:25. We're on a good schedule. We have to set up  
19      the video, so I think this is a good time to take a morning  
20      break and go to the bathroom and get something to drink, and  
21      then --

22               How long; maybe 15 minutes, 10, 15 minutes?

23               MR. MINO: Yes.

24               THE COURT: Okay, to set up the video, and then  
25      we'll take our lunch break.

1                   Okay. Thank you.

2                   THE COURT CLERK: All rise.

3                   (The jury exits)

4                   THE COURT: Okay. See you in 15 minutes.

5                   MR. ROSENTHAL: Thank you, Your Honor.

6                   (Recess taken)

7                   (Jury out)

8                   THE COURT CLERK: All rise.

9                   THE COURT: Okay. Are we good?

10                  MR. MINO: Yes.

11                  MR. ROSENTHAL: Yes, Your Honor.

12                  THE COURT: All right. Bring in the jury.

13                  THE COURT CLERK: All rise.

14                  (The jury enters)

15                  THE COURT: Okay. Welcome back, everyone.

16                  We have another movie. It's not "Modern Family,"  
17 but it's just as interesting, and we're going to play it  
18 now.

19                  It's the testimony of Dr. --

20                  MR. MINO: Dr. Robert Dennis.

21                  THE COURT: -- Dr. Robert Dennis, who will offer  
22 testimony regarding medical issues in this case. Okay?

23                  And how long is the movie, just so we know?

24                  MR. MINO: It is about an hour and a half.

25                  THE COURT: Okay. An hour and a half. And then

1 after the movie, we'll take a longer lunch break today,  
2 maybe an hour, a little bit longer, and we'll come back, if  
3 we can, give you a jury charge, and then dismiss you for the  
4 day, if we can get the charge worked out.

5 Tomorrow, we just have closing statements and  
6 deliberations. Okay?

7 So it's almost 11, so this is perfect. We'll  
8 probably break around 12:30, we'll probably come back at  
9 two, and -- does that make sense?

10 MR. ROSENTHAL: Your Honor, can we be seen at  
11 sidebar for a moment?

12 THE COURT: Sure. Sure. Of course.

13 (The following takes place at sidebar)

14 MR. ROSENTHAL: I don't want to be --

15 THE COURT: Tell me.

16 MR. ROSENTHAL: -- nitpicky, but I think it might  
17 be better if we have the charge and then the closings  
18 together.

19 MR. MINO: Well, in that case, I'm not ready to  
20 close today.

21 MR. ROSENTHAL: No, no, tomorrow. Tomorrow. I'm  
22 not saying do it now.

23 MR. MINO: Okay.

24 THE COURT: It's fine. You're right. It's fair.  
25 I was trying to make tomorrow easier. It's fair. I think

1       you're right.

2                   But let's get it done totally for the reason that  
3       Alex is going to Scotland tonight.

4                   (Laughter)

5                   MR. ROSENTHAL: We're going to get the charge  
6       done.

7                   THE COURT: Totally done.

8                   So we'll dismiss them. I'll tell them after the  
9       movie's over that they are free to go for the day, and we'll  
10      come back tomorrow at 10.

11                  MR. ROSENTHAL: All right. Thanks.

12                  (The following takes place in open court)

13                  THE COURT: Okay.

14                  (The videotaped deposition of Dr. Robert Dennis was  
15      played.)

16                  (Playback ends)

17                  THE COURT: Are we done?

18                  MR. MINO: Yes.

19                  THE COURT: Okay.

20                  So, ladies and gentlemen of the jury, it is now  
21      12:20. I spoke with the lawyers, and I think it makes more  
22      sense to release you for the day and come back tomorrow, and  
23      we'll have the charge and we'll have the closing statements,  
24      and then you will be given the opportunity to deliberate.

25                  I originally thought I would hold you, but in case



1       there's a delay and it takes longer to finalize the charge,  
2       I don't want you guys sitting around this afternoon waiting  
3       when I could just have it go more smoothly tomorrow.

4               The charge usually takes about an hour, maybe a  
5       little less in this case, and then we'll have closing  
6       statements. We'll order lunch for you, compliments of the  
7       Federal Courts, and then we'll give you the case to  
8       deliberate.

9               I'm very aware of the value of your time. I don't  
10      want to hold you here for an hour and a half, two hours if  
11      it takes longer. You have to come back anyway tomorrow. We  
12      might as well do the whole thing in the morning. So that's  
13      what we're going to do.

14              So I'm going to discharge you for the day.

15              I will remind you of your responsibility to not  
16      talk about the case, you'll have that opportunity tomorrow  
17      when you deliberate, and not to do any independent research,  
18      and to enjoy the rest of the day, and we will resume  
19      tomorrow at 10 a.m. I know it's a little hard in the  
20      morning with traffic; it gives you a little bit of wiggle  
21      room, so to speak. And my hope and expectation is that  
22      we'll be able to conclude everything tomorrow.

23              Okay? So with my gratitude, and the gratitude of  
24      the lawyers, you are discharged for the day. We'll see you  
25      tomorrow at 10 a.m.

1 Thank you.

2 THE COURT CLERK: All rise.

3 (The jury exits)

4 THE COURT: Okay, guys. We can take a break and  
5 come back. It's 12:30.

6 Does it make any sense at all to meet with  
7 Judge Wettre, since we have time this afternoon, about  
8 settlement? Is that something that's on the table? We  
9 never talked about it, for obvious reasons, I'm the trial  
10 judge. She popped in the other day and said if they wanted  
11 to see me again, I'm here.

12 So it's up to you.

13 MR. ROSENTHAL: I don't think that --

14 THE COURT: Let me ask PATH.

15 We're off the record, of course. Let's go off the  
16 record.

17 (Off the record discussion)

18 THE COURT: Okay. Thank you.

19 THE COURT CLERK: All rise.

20 (Luncheon recess taken)

21

22

23

24

25

1                    A F T E R N O O N     S E S S I O N

2                    (Jury out)

3                    THE COURT CLERK: All rise.

4                    THE COURT: Back on the record.

5                    Charge conference.

6                    I'm going to mark, or Amy is going to mark,  
7                    rather, I think this will be Court Exhibit 7. Okay? And I  
8                    marked it 7 because, what I did was, I marked yesterday the  
9                    first draft I gave you, and then marked the draft I gave you  
10                   of instructions, the draft verdict sheet, and I marked your  
11                   proposal.

12                   And I took into consideration some of those  
13                   arguments, recognizing that everything you objected to is  
14                   preserved and we have the record now with the Court  
15                   Exhibits, and I incorporated some of the changes that you've  
16                   asked for, but we can go through them, and I even made  
17                   further modifications to the earlier ones this morning that  
18                   I didn't mark as a Court Exhibit because we didn't discuss  
19                   it.

20                   So this is what I think is close to the final, but  
21                   I'll hear everyone. There's really only a very small amount  
22                   of -- these are probably the narrowest instructions I've  
23                   ever worked with. It's really one count, which makes it  
24                   easier for everybody.

25                   So why don't we begin with Plaintiff's counsel?

1 MR. ROSENTHAL: Reading through -- first of all,  
2 Your Honor said that all of our prior objections are  
3 preserved, so I don't need to go back over them now?

4 THE COURT: Well, let's see. The ones that you  
5 made on the record yesterday are all preserved.

6 MR. ROSENTHAL: Okay. So if one wasn't put, I  
7 don't need to --

8 THE COURT: No. That's why I did it this way.

9 MR. ROSENTHAL: Okay.

10 THE COURT: You made your objections on the record  
11 yesterday and marked them, they're preserved as part of the  
12 record, nothing's waived, but if there's a new objection,  
13 you need to let me know.

14 MR. ROSENTHAL: I don't have an objection to  
15 anything that's in here. I do -- actually, I don't have any  
16 objection, really, at this point to anything that is in the  
17 jury instructions other than what I voiced yesterday.

18 I still have an objection to putting his --  
19 whatever it is in there --

20 THE COURT: The basis for his claims?

21 MR. ROSENTHAL: No, no.

22 THE COURT: Where is that? What page is that on?

23 MR. ROSENTHAL: You know what?

24 THE COURT: What page is that on, Alex?

25 LAW CLERK SILAGI: It should be on page -- page

1       10.

2               THE COURT:   Page 10, "The Parties' Claims."

3               MR. ROSENTHAL:   Yes, "The Parties' Claims."   The  
4       only suggestion that I would have is, after -- on page 11,  
5       you say, "PATH denies Mr. Foder's claim."   I think that you  
6       should say Plaintiff denies PATH claim after you set forth  
7       their contributory negligence claim, their claim of  
8       negligence for the Plaintiff.

9               THE COURT:   All right.   So PATH denies Mr. Foder's  
10      claim and Mr. Foder denies PATH's claim?

11              MR. ROSENTHAL:   Right.

12              THE COURT:   That's fine.   That makes sense.   I'll  
13      add that:   "Mr. Foder denies PATH's claim."   That will be on  
14      line six.

15              MR. ROSENTHAL:   Right.

16              THE COURT:   It's in.

17              MR. ROSENTHAL:   Other than that, I think I'm fine.

18              The issue of -- you have in there Plaintiff's  
19      instruction 76.   I'm not sure -- and you probably have  
20      struggled over this as well, because it's the last charge in  
21      the negligence area.   I'm not sure whether it should go in  
22      damages or not.   But other than that --

23              THE COURT:   I think it makes sense to put it  
24      there.

25              MR. ROSENTHAL:   Then I have no objection.

1 THE COURT: I just want you to know, I just give  
2 an explanation on paragraph 49 and 51, and that is about  
3 assumption of the risk. The case that I used was your case,  
4 the Fashauer case. The Court has expressly said use that  
5 language, so I used it.

6 MR. ROSENTHAL: Yes.

7 THE COURT: But I think it adds some ambiguity, so  
8 I added -- the "in other words" was me.

9 MR. ROSENTHAL: I have no objection to the charge.

10 THE COURT: Okay.

11 Okay.

12 MR. MINO: So as far as what is in here and  
13 written on the page, PATH has no objection.

14 However, PATH -- and I guess it was my fault  
15 because I thought I raised it yesterday, but I did not.

16 PATH would ask that a mitigation of damages charge  
17 be put in.

18 There was testimony from Dr. Greisberg that not  
19 wearing the floor orthotic would aggravate the tibial  
20 tendinitis. He said not the osteochondral lesion, but the  
21 tibial tendinitis.

22 Plaintiff testified that he does not always wear  
23 the floor orthotic. Dr. Dennis testified that when he came  
24 to see him, he was not wearing it.

25 So Plaintiff is going to add that -- claim that as

1 part of his damages.

2 THE COURT: Was there testimony that he was told  
3 to wear it?

4 MR. MINO: Yes. He testified himself, yes, I wear  
5 it, I just don't wear it all the time.

6 THE COURT: Was there testimony that he was told  
7 to wear it all the time?

8 MR. MINO: There was testimony that he was told to  
9 wear it. It's also in Dr. Greisberg's records to wear the  
10 floor orthotic.

11 THE COURT: All the time. In other words, I  
12 thought the testimony was he wore it some of the time.

13 MR. MINO: Yes.

14 THE COURT: But was there any express instruction  
15 he should wear this all the time? Like a retainer: Do you  
16 have to wear it all the time?

17 MR. MINO: The testimony from Dr. Greisberg is  
18 that if he doesn't wear it, he would aggravate the tibial  
19 tendinitis. That was the question posed to him, and he said  
20 yes.

21 THE COURT: Okay.

22 MR. ROSENTHAL: But if he doesn't wear it -- I  
23 mean, I think what Your Honor was asking was, if he doesn't  
24 wear it at all, that's one thing, but if he wears it and  
25 doesn't wear it all the time, that's something else. And

1 I'm not sure that --

2 THE COURT: No, I mean, I wasn't aware that --  
3 given that proffer, I'll add that mitigation in. I mean, I  
4 think it's very slight.

5 This is not a case like, don't run, and don't  
6 swim, or don't run, and the guy is out doing marathons.  
7 This is not the case. In fact, this is the case where the  
8 Plaintiff went to the PATH doctors and followed instructions  
9 and went back to work. So this is really not that case.

10 But if there is any evidence that he didn't  
11 completely follow to the T the doctor's instructions, I  
12 think it would be appropriate to put in the mitigation.

13 So I'll put that language in, the one paragraph.  
14 Okay?

15 MR. ROSENTHAL: And Plaintiff objects but  
16 understands the Court's ruling.

17 THE COURT: Okay. So noted. I note your  
18 objection. I'll put it back in.

19 So we're going to put that in, and the other  
20 change, the line that we added, and then we're going to take  
21 out all the Plaintiff's instructions, all the little heads  
22 and the case cites and the quotes --

23 MR. ROSENTHAL: Oh, the --

24 THE COURT: -- because the jury -- I'm going to  
25 give them copies of this to take into the jury room with



1       them, so I don't want them to see anything other than  
2       Plaintiff's instructions, Defendant's instructions.

3               MR. ROSENTHAL: I understand.

4               MR. MINO: That was actually going to be a  
5       question I have. Are we going to give -- will they have the  
6       instructions physically --

7               THE COURT: Yes.

8               MR. MINO: -- when we're doing our closing, or not  
9       until they go back?

10              THE COURT: They will not have them. I'll make  
11       sure they listen --

12              (Laughter)

13              MR. MINO: Okay.

14              THE COURT: I'll give them all their cell phones  
15       -- I'll give them wifi during your closings. How's that?

16              (Laughter)

17              MR. ROSENTHAL: Netflix.

18              THE COURT: I'll give them Netflix.

19              (Laughter)

20              THE COURT: I'll send one copy into the jury room.

21              MR. MINO: Okay.

22              THE COURT: And that's it. Okay?

23              And make sure today before you leave that you go  
24       over with Amy all the exhibits so we can put them in.

25              MR. MINO: I was actually just going to mention,

1 counsel and I have, with the Defendant's Exhibit I, the PATH  
2 medical records, counsel and I went over --

3 THE COURT: Perfect.

4 MR. MINO: I pulled everything out we discussed  
5 it, so --

6 THE COURT: All right. So give that to Amy.  
7 She's in charge of all the evidence.

8 So let me make this one change. We'll come back  
9 out, give a quick look.

10 The verdict sheet I changed to incorporate your  
11 changes. I thought they were very good changes, actually.

12 Amy has marked this as 7, the final will be Court  
13 Exhibit 8, and you'll get copies, and you can go home and  
14 get ready for your big day tomorrow. Okay?

15 So give me a couple of minutes.

16 THE COURT CLERK: All rise.

17 (Defendant's Exhibit I marked in evidence)

18 (Recess taken)

19 (Jury out)

20 THE COURT CLERK: All rise.

21 THE COURT: Everyone, you got the final version  
22 that Alex brought out to you a minute ago?

23 MR. ROSENTHAL: Yes.

24 MR. MINO: Yes.

25 MR. DiGIULIO: Yes.

1                   THE COURT: Any comments, questions,  
2       modifications?

3                   MR. ROSENTHAL: We're all --

4                   THE COURT: We're all good? Okay. So we'll mark  
5       this --

6                   Amy, what is this marked as? Court Exhibit 8?

7                   THE COURT CLERK: Yes.

8                   THE COURT: This is the final.

9                   This is Court Exhibit 8, the final. You guys have  
10       the final.

11                   We'll come in tomorrow, call the jury in around  
12       10. You don't have to get here before 10. Ten is fine.  
13       And this should take me 45 minutes to read, and then do your  
14       closings, I'm sure they'll be no more than a half hour, 45  
15       minutes each, they'll get their lunch, and hopefully we'll  
16       get a verdict; if not, we come back on Monday. Okay?

17                   Have a good night's sleep. Have a safe trip home.  
18       We'll see you tomorrow at 10.

19                   THE COURT CLERK: All rise.

20                   (Court Exhibits 7 and 8 marked for identification)

21                   (Matter adjourned until Friday, November 18, 2016,  
22       commencing at 10 a.m.)

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